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No. 96-574

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

In The Supreme Court Of The United States

OCTOBER TERM 1996

JANICE E. HETZEL,

Petitioner,

v.

COUNTY OF PRINCE WILLIAM AND CHARLIE T. DEANE,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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36pp

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant a writ of certiorari to a petitioner who told the Fourth Circuit Court of Appeals to overturn the jury award she received if it found that award "a miscarriage of justice," based on her new argument that the standard she urged on the Court of Appeals is really inappropriate under the Seventh Amendment?

2. Should a writ of certiorari be granted to review a Court of Appeals decision that the Petitioner, who is entitled to only a "pittance" of the recovery she sought in this case, is not entitled to a full award of $176,293 in attorneys' fees?

3. Should this Court expend its limited time and resources reviewing a Court of Appeals decision that the Petitioner is not entitled to damages for alleged acts which either did not amount to legal wrongs or which occurred outside all statutes of limitation applicable to her claims?

4. Should this Court review a Court of Appeals decision declining to address an issue it found made no difference to the outcome of this particular case simply because it made that finding summarily?

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BRIEF OF RESPONDENTS PRINCE WILLIAM COUNTY AND CHARLIE T. DEANE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents ask the Court to deny the Petition For a Writ of Certiorari, which seeks review of an opinion by the United States Court of Appeals for the Fourth Circuit. For the convenience of the Court, all citations to the Court of Appeals opinion and trial court opinion of the United States District Court for the Eastern District of Virginia, will be to the Appendix of the Petition, where both have been included.

STATEMENT OF THE CASE

Contrary to Petitioner's assertions, this case does not present any important question concerning the proof or quantum of emotional distress damages or the award of attorneys' fees in civil rights cases which has not already been addressed by this Court. This Court's decisions were applied appropriately by the Fourth Circuit. Further, even if the questions Petitioner raises were unresolved by this Court, the questions which are central to the Petition, on the Seventh Amendment and the propriety of the attorneys' fee award, are not properly before the Court in this case either because they were never raised below or are not now ripe for decision.

As the Petition states, this was a civil rights action brought by Petitioner, Officer Janice Hetzel, against the Respondent County, the Respondent Police Chief, and two of her superior officers.[1] At the heart of this case, as it was filed and tried in the Eastern District of Virginia, were her empty

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[1] The jury completely absolved the latter two officers.

allegations of sex and national origin discrimination and harassment. In 10 counts, Officer Hetzel claimed a total of $9.3 million in damages, requested an immediate promotion with an award of back pay and front pay, and sought an injunction against the Police Department. The jury found that there had been no discrimination or harassment and ruled for the Defendants on seven out of ten counts. It found against the County and the Chief on three counts of retaliation, awarding $750,000. On the Defendants' Rule 50 motion, the district judge vacated the verdict and the award for the count of pure retaliation under the Fourteenth Amendment, because no such cause of action exists. The trial court denied the balance of Defendants' Rule 50 and all of the Rule 59 motion and confirmed the verdict on the other two counts for a total award of $500,000. The trial court also awarded the full $176,293 in attorneys' fees Officer Hetzel claimed. Both parties appealed the trial court decision to the Fourth Circuit, which, in an opinion by a unanimous panel, reversed and remanded the case on the damages and attorneys' fees issues. Officer Hetzel sought no *en banc* rehearing from the Fourth Circuit, filing this Petition instead.

This Petition is Officer Hetzel's latest attempt to force the Board of County Supervisors, and through it, the taxpayers of Prince William County, to pay her an enormous sum of money with no proof that she is entitled to it. Her earlier attempts at trial did, unfortunately, meet with success. However, the serious injustices that the trial court did to the County and its Chief of Police were corrected by Fourth Circuit, applying standards of review that Officer Hetzel herself advanced.

Now she claims that the Court of Appeals cannot recognize an abuse of discretion when it sees one. She asks this Court to reverse the Court of Appeals, revive a verdict which it expressly found to be "outrageous," "grossly

excessive," and a "serious miscarriage of justice,"[2] and award her $176,293 in attorneys' fees even though she failed in her most significant claims, and regardless of the amount of damages that might ultimately be fixed in this case. She asks the Court to do all this on the basis of a Petition full of sound and fury, but which does not present any meritorious arguments. No justice would be served by granting a writ to her.

A. Factual Background

Officer Hetzel alleges that the Court of Appeals reversed the verdict because it conducted a review of the "cold paper record" and reached different factual conclusions than the jury and the trial judge. Although it did not adopt all of the trial court's interpretations of them, the Court of Appeals relied only upon those facts which were found by the trial court, or which Officer Hetzel did not dispute. The County and the Chief adopt the Court of Appeals' recitation of the facts in this case, and supplement them only to refute Officer Hetzel's myriad allegations of an egregious situation, which simply did not exist.

B. Correction of Factual Misstatements and Omissions in the Petition.

The Petition section entitled "Factual Predicates for Petitioner's Claims" recites "facts" which are almost entirely irrelevant to the issues she raises to this Court.[3] Officer Hetzel gives snippets of the evidence and asks this Court to conclude that the Court of Appeals, in making findings on

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[2] Petition Appendix ("App.") at 7a ("outrageous") and 8a ("grossly excessive" and "a serious miscarriage of justice").

[3] Further, the section reads as if these were the factual findings of the district court. They were not.

broader issues which seem to Officer Hetzel to conflict with these snippets, invaded the province of the jury. She tries to portray herself as a victim, of both the Defendants and the Fourth Circuit. In order to dispel any misimpression, the County and the Chief are compelled to correct the most glaring misstatements and omissions in the Officer Hetzel's statement of the facts in this case.[4]

Neither Prince William County nor its Police Chief have ever been found by a court or administrative agency to have discriminated against any employee on the basis of gender or national origin, or, indeed, on any basis prohibited by state or federal law.[5] The County and the Police Department are justifiably proud of this fact. It is true to this day, despite Officer Hetzel's claims.[6]

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[4] Any court reviewing the Petition should, as the Fourth Circuit did, look askance at Officer Hetzel's recitation of the facts. It bears noting that the district court found that "there is a likelihood that she would interpret any act of discipline as retaliation." App. at 26a. Second, the district court noted that she has a tendency to overreact. App. at 26a.

[5] The Police Department has 516 employees, 329 of which are sworn officers, like Officer Hetzel. Contrary to Officer Hetzel's assertions, she is not the only Hispanic female officer. The force is composed of men and women from a variety of racial and ethnic backgrounds.

[6] However, as a result of this case, the Police Department can no longer say that it has never been found guilty of retaliation. This is a painful situation with negative effects that reach beyond this case. This situation will never change, because, right or wrong, the finding made by a federal jury, was left in place by a federal court of appeals affording that jury finding the deference required by law. The Fourth Circuit's deference to the jury on this finding undercuts Officer Hetzel's suggestion that it was motivated to ignore the law to favor the County and the Chief.

1. Officer Hetzel's Record and the Conduct of the Department.

Officer Hetzel remains an employee in good standing. The Petition states that she is a certified crime scene technician, a hostage negotiation team member, a certified criminal justice instructor, and a four-time recipient of the Officer the Month award. It omits the fact that the Department trained her for and gave her these certifications and honors. She was appointed to the hostage negotiation team one month before this trial. Further, she has consistently received commendations and other accolades since she was hired.

She continues to omit mention of the fact that her performance evaluations were positive and they gave her the tools to prepare herself for promotion. First Sergeant John Collier, the witness to whom she points as providing corroboration for her damage claims, testified that Officer Hetzel's evaluations were normal in both their ratings and comments for an officer of her experience. The Court of Appeals noted that the last evaluation in the record "was nothing short of stellar." App. at 5a. Although they appropriately commented upon and rewarded her strengths, all of these evaluations noted her problems with accepting constructive criticism and her deficiencies in "people skills." She continues to insist that these deficiencies did not exist and that the Chief simply made them up to justify not promoting her. She did not appeal any of these evaluations. She was certainly not "victimized" with respect to receiving annual pay raises for good performance; and the Police Department told her repeatedly what it perceived her weaknesses to be.

Officer Hetzel continues to ignore the special training she received, and the opportunities she was given, and which

she threw away, to demonstrate supervisory skills and leadership ability. In 1990, she was appointed to the Management Planning Team, and failed, with no explanation, to attend its meeting. In the Spring of 1991, she was made a Field Training Officer, responsible for training rookie officers, and abruptly refused to continue training her assigned rookie, with no explanation to the rookie or to supervisors. In late 1991, she was made a team leader in the Team Policing Project, and she abruptly resigned her duties one month before the six-month pilot program ended, again, with no explanation. The Police Department did not "victimize" her by trying to hold her back. These failures were of her own making.

The Defendants have acknowledged since the beginning of this litigation that as a patrol officer, Officer Hetzel has, on balance, performed well. She has simply not been, to date, as qualified for promotion to sergeant as those who have been promoted.[7]

The Petition flatly misrepresents that her record has been "exemplary." She does not tell this Court that, by the time of trial, she had been disciplined three times. She was reprimanded in writing for missing a meeting, discipline she might not have received had she not already compiled a

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[7] In several footnotes to her Petition (4,5,6, and 7), Officer Hetzel relates aspects of the disciplinary records of other officers who were promoted. Even if she had not grossly mischaracterized the facts in these cases (see footnote 13, *supra*), not one of these people competed with her for a promotion, or were promoted instead of her. At trial and before the Fourth Circuit, she was able to draw no credible favorable comparison between herself and the people who were promoted to sergeant in the years she was eligible. This is another example of Officer Hetzel trying to inflame readers on a point that goes to liability, and not to the excessiveness of compensatory damages, which is the issue here.

history of lateness to roll call.[8] Her Petition does not reveal that she received an oral reprimand for threatening a suspect, using profane language as part of the threat, while swinging her nightstick at his head. She did not receive harsher punishment for that incident because she was strongly supported by First Sergeant G.W. Jones, whom she later named as a defendant in this case. She ridicules the Department for suggesting that she is not a "team player," but she omits to mention that she asked a black rookie officer where his white training officer was by saying "where is your master?" This conduct, which disrupted the squad and earned her a written reprimand, can hardly be deemed collegial and exemplary.

Whether this fact is material or not, she should not have described herself as a "team player" in light of the evidence at trial, unrebutted by her, that she made several unfounded Internal Affairs complaints about superiors and fellow officers ranging from simply silly to truly bizarre.[9] Again, this conduct undercuts her self-aggrandizing assertions.

2. <u>The Promotional Process.</u>

Importantly, the trial court refused to promote Officer Hetzel, saying that:

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[8] In her Petition, Officer Hetzel criticizes the Defendants for confronting her with a tardy slip but omits the facts that she accepted this reprimand at the time and that she had claimed at trial that there was no factual basis for any allegation that she was consistently late to work.

[9] Officer Hetzel complained that others did a variety of things to her, from yelling and pounding on a desk while talking to her to attempting to run her down with an automobile. None of these complaints were founded.

> The Court cannot grant plaintiff's motion with regard to the position of sergeant. The jury found that Defendants' failure to promote plaintiff to sergeant was not motivated by discriminatory intent. Although the jury may have found that the failure to promote was retaliatory, the verdict is too ambiguous to support the equitable relief requested by plaintiff. Having observed the plaintiff's demeanor at trial, *the Court is concerned that plaintiff does not now possess the temperament necessary to be an effective sergeant.*

App. at 26a (emphasis supplied). The Fourth Circuit affirmed the trial court on this point, noting:

> We can find nothing in the voluminous record in this case that even suggests that the district court abused its discretion, and *we will not order that someone be promoted to a higher level within a paramilitary organization where they lack the requisite qualifications to perform the duties of the job effectively.*

App. at 11a (emphasis supplied). Officer Hetzel has not petitioned this Court to review this aspect of the Court of Appeals' decision. Therefore, all of the discussion in the Petition about the promotional process is irrelevant.

From start to finish, this litigation has been her attempt to shoulder her way ahead of others who have had more experience and better records than she has. Now that she realizes that she cannot obtain a judicial promotion, she continues to mis-characterize the County's promotional process in hopes of reviving the outrageous damage award. [10]

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[10] In affirming the trial court holding that Officer Hetzel is not entitled to back pay, the Fourth Circuit noted: "With respect to back pay,

Officer Hetzel claims that even though she would not have earned more money as a sergeant, she is entitled to $500,000 in compensatory damages.[11]

Neither the Court of Appeals nor the trial court found that Officer Hetzel had been "victimized" by the Department because she has not been promoted. On average, 90 officers compete in each Assessment Center for promotion. She is on the same footing with many qualified officers who have not yet been promoted.[12]

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the evidence clearly showed that Hetzel earned more as a police officer than she would have earned as a sergeant, because officers, but not sergeants, are paid overtime." The only evidence introduced at trial on the relative pay rates of officers and sergeants was introduced by Officer Hetzel, and it was this evidence to which the Fourth Circuit referred.

[11] First, Officer Hetzel incorrectly suggests that the Chief of Police knows the Assessment Center ranking of officers and that he ordinarily promotes people in numerical order from that list. At trial, the Department proved that its written policies provide that the names of the top 20% of the applicants based on Assessment Center performance are sent to the Chief in alphabetical order. The Chief testified that, in accordance with written policy, the numerical rankings among the top 20%, which he does not know, are irrelevant when he makes a promotion decision. Officer Hetzel produced no evidence to show a pattern or practice of promotions based on numerical scores from the Assessment Center, once the top 20% of candidates is identified for the alphabetical list.

Second, she states that when she ranked second as a result of the 1994 Assessment Center, the officer who tied her score, a white male, was promoted. The evidence demonstrated that this male officer had *not* been promoted. Further, as the testimony of First Sergeant Collier, and Master Police Officer Louie Barr, both white males, indicated, officers who have been on the force substantially longer than Officer Hetzel have not been promoted.

[12] First Sergeant John Collier, a white male, testified at trial that he had been passed over 40 times.

3. The 1995 Internal Affairs Investigation.

Officer Hetzel's Petition does not mention the Internal Affairs Investigation which was begun against her in the week before the trial among the litany of wrongs she claims against the Department. Given her emphasis on this at trial, the finding of the Court of Appeals that this is one of only two allegations of wrongdoing on which she can, as a matter of law, recover compensatory damages, and the lack of restraint she displays elsewhere in her Petition, the omission is curious.[13]

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[13] For example, Officer Hetzel does not scruple to renew allegations of discrimination and harassment against G.W. Jones, who prevailed before the jury. Petition, footnote 7. She recites hearsay statements attributed to Lieutenant Toussaint Summers as if he testified in this matter. Petition, p. 7. He did not.

Her attorneys go beyond the bounds of zealous representation in mischaracterizing disciplinary actions against other employees, which are not material here in any event. If the County correctly recognizes the instances which she misdescribes, then these are the facts in those cases: the first officer referred to in footnote 4 of the Petition has never been disciplined for lying; he was suspended for misplacing evidence about a potential witness in a potential murder case. The "evidence" did not relate to the murder itself. His employment status was never on "probation;" he had been on the force, with an otherwise unblemished record, for a substantially longer period of time than Officer Hetzel at the time he was promoted to a position for which she did not compete.

The second officer, referred to in footnote 4 of the Petition, was never found to have committed domestic assault; he was engaged in two incidents of mutual affray with women. He was suspended for that conduct, and his punishment was never rescinded. The Chief made a decision not to make him prove that he had been to counseling, the same decision he made with respect to Officer Hetzel when he ordered counseling for her. This officer was promoted to a position for which Officer Hetzel did *not* compete after he went four years without another disciplinary incident.

Approximately two weeks before the trial, the Chief of Police received a complaint that Officer Hetzel had, the year before, first agreed and then refused to transcribe the tape of an interrogation she had conducted with an Hispanic suspect, in Spanish. As the allegation developed, the Chief learned that she had obtained a defective waiver of the suspect's *Miranda* rights, but she represented to the non-Spanish speaking detective present that she had obtained an appropriate waiver and proceeded to take the suspect's

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Officer Hetzel reported her conversation with the officer described in footnote 5 to her supervisor. She specifically declined to file any charges against the officer, who denied her allegations. The supervisor nonetheless investigated the allegation, and the Internal Affairs unit became involved in reviewing comments made by three members of the Vice Narcotics unit. This is the "investigation of racism in the Department" that Officer Hetzel misdescribes. This officer was disciplined. He was made detective, which was, at the time, a lateral reassignment and not a promotion, several years after this event, and no further allegation has ever been made against him.

The County and the Chief frankly do not recognize the second officer described in footnote 5. No officer testified at trial that he or she had ever used racial epithets against citizens, or to describe citizens.

In footnote 6 of the Petition, Officer Hetzel refers to the fact that Ron Sullins has, since the trial of this case, been promoted to Lieutenant. She fails to mention that she never made any allegation against Lieutenant Sullins before this litigation, that he took the stand and denied her allegations, and that no finding of discrimination, harassment, or retaliation has ever been made against him.

She makes this miasma of allegations against other employees in an apparent attempt to show that the Police Department is infested with race and gender bias, and that she was subjected to a hostile work environment, and she should recover a large sum, regardless of whether she is entitled to it as a matter of fact or law. Misstatement of the facts is never appropriate, but it is particularly offensive here, where the jury rejected her allegations of discrimination and harassment. This litany is irrelevant to her retaliation claim.

confession. When the tape was transcribed by an outside source after Officer Hetzel refused to do it (because of a personal problem she had with the prosecutor on the case), the confession was revealed to be defective and was suppressed by the Prince William County Circuit Court.

The prosecutor complained at the time to Officer Hetzel's supervisor, First Sergeant Collier, but the complaint was not documented or investigated. When he learned of it in January, 1995, the Chief ordered Internal Affairs to investigate the conduct of both Officer Hetzel and her supervisor. An Internal Affairs officer interviewed her for approximately 15 minutes on a night when they were both scheduled for regular duty, one week before trial. She did not allege at trial that the interviewer assaulted her, or threatened her, or raised his voice, or used any profanity toward her. After that interview, and after speaking with her attorney, she was distraught, and displayed emotion witnessed by other officers who later testified about it at trial. She composed herself and finished her shift. Ultimately, the investigation resulted in disciplinary action against Office Hetzel,. but she remains in good standing in the Department.

At trial, she portrayed this initial 15 minute interview as "shattering," and, indeed, it was the one incident in the record which the trial court felt "justified" the award of $500,000 in damages. The Fourth Circuit deemed this holding error as a matter of law, resulting in an outrageous verdict. There is no reason to review the Fourth Circuit holding.

REASONS WHY THE PETITION SHOULD BE DENIED

This Petition is another milestone in Officer Hetzel's sustained effort to prevail by obfuscation, distortion, and

omission of facts. Had the trial court exercised appropriate discretion, and had it reviewed this record on the Rule 50 and Rule 59 motions dispassionately and in accordance with well-established legal principles, it would not have confirmed the damage award of $500,000, and it would not have ordered the full amount of attorneys' fees sought. The Court of Appeals corrected the trial court's errors of law and abuses of discretion, and its decision should stand.[14] Indeed, Officer Hetzel has not advanced sufficient grounds in this Petition to set it aside.

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[14] In addition to finding that Officer Hetzel's performance at counsel table was evidence that should have been considered by the jury in fixing damages, the trial judge committed other errors of law. The Court of Appeals did not address these other errors, but they are worth noting, as they were raised by Defendants on appeal.

In ruling on the question of whether Officer Hetzel's lawsuit was public speech, protected by the First Amendment, the trial court held that "the number of reporters present throughout the trial and the interest with which this case was followed in the press demonstrate that matters of public concern were involved." Apart from the fact that this is not the proper test for determining when an employee's speech involves matters of public concern, there was absolutely no evidence presented at trial on the number of reporters present or whether the media actually reported on the case. App. at 16a.

Further, the trial court found that the fact that the Police Department investigated allegations of the use of racial epithets and issued a memorandum telling employees that such conduct would not be tolerated was proof that epithets had been used: "Whether the use of epithets in the department in 1989 rose to the level of a hostile environment is not before this Court. However, such language was clearly present enough to warrant an investigation and, thereafter, a department-wide memorandum addressing the problem..." App. at 17a-18a.

I. THE FOURTH CIRCUIT REVIEWED THE TRIAL COURT'S DECISION TO UPHOLD THE DAMAGE AWARD USING THE APPROPRIATE STANDARD OF REVIEW.

A. The Fourth Circuit applied the standard urged on it by Petitioner.

This Court has the prudential rule that issues that were not raised and addressed below, but which could have been, will not be addressed on a writ of certiorari unless extraordinary circumstances obtain. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed. 2d 15 (1980).

The Petition, filed last month, marks the debut of the Seventh Amendment argument in this case. Officer Hetzel urged the Fourth Circuit to follow the earlier Fourth Circuit holdings in *Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 1992), and *Barber v. Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994).[15] The Court of Appeals relied on these cases, among others, in reversing the district court's refusal to find the damages excessive as a matter of law. The Court of Appeals' decision is announced using the terms established by these cases. App. at 4a - 9a. If Officer Hetzel believes that the standard of review established in these cases violates the Seventh Amendment, she should never have urged them on the Court of Appeals.

She might argue that this Court's decision this past June in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. ___, 116 S.Ct 2211, 35 L.Ed 2d 659 (1996) interpreted the Seventh Amendment in such a way as to make an argument

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[15] She continues to assert that *Barber* cites the correct standard for excessiveness of verdicts in civil rights cases. Petition at 21.

available that was not possible when this case was briefed and argued to the Court of Appeals. She would be wrong. *Gasperini* broadened, rather than narrowed, appellate review of damage awards.

In *Gasperini*, this Court remarked on the line of cases from the various federal circuit courts of appeal reversing denials of new trials because "the size of the verdicts seems to be too far out of line" and announced:

> We now approve this line of decisions, and thus make explicit what Justice Stewart thought implicit in our *Grunenthal*[16] disposition: "[N]othing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." 393 U.S., at 164, 21 L.Ed. 2d 309, 89 S.Ct. 331 (Stewart, J., dissenting)

518 U.S. at ____, 116 S.Ct. at 2224,135 L.Ed 2d at 679. Before *Gasperini*, the existence of appellate review authority over trial court denials of new trials on these grounds was doubtful. As Officer Hetzel states in the Petition: "Indeed, this Court's precedent suggested, with fair uniformity, that such review was not available." Petition, at 12.

She did not raise the Seventh Amendment issue below, at a time when she had a better opportunity to prevail on that argument than she does now. In the wake of *Gasperini*, this Court ought to deny her Petition for that failure. Further, the Petition ought to be denied because the Seventh Amendment argument advanced by Officer Hetzel

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[16] *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed 2d 309 (1968).

fails as a matter of law. The Court of Appeals applied the standard of review implicitly approved in *Gasperini*.

B. The Fourth Circuit Found That the Trial Court Abused Its Discretion In Upholding the "Monstrous" Damage Award.

Gasperini addressed the question of how federal courts of appeals, reviewing a diversity action, should apply appellate standards of review established by state law. Assuming that *Gasperini* applies to the much different facts of this case,[17] the Fourth Circuit paid the deference to the decision of the trial court on the County's Rule 59 motion approved in *Gasperini*.[18]

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[17] This Court did not specifically define the term "abuse of discretion." As Justice Stevens noted in his dissent, "the majority carefully avoids defining too strictly the abuse of discretion standard it announces. To the extent the majority relies only on "practical reasons" for its conclusion that the Court of Appeals should give some weight to the District Court's assessment in determining whether state substantive law has been properly applied, I do not disagree with its analysis." *Gasperini*, 518 U.S. at ___, 116 S.Ct. at 2230, 135 L.Ed. 2d at 686.

[18] The County made two motions after the jury rendered its verdict in this case, one under Rule 50 and the other under Rule 59. In refusing the County's request that the award be substantially reduced commensurate with the evidence, the district court did not distinguish between the two motions, or state which one it was denying at that point. As a matter of law, the trial court should have reduced the damage award in this case, as the Fourth Circuit has done, based on the County's Rule 59 motion.

The Fourth Circuit distinguished the analysis for a Rule 59 motion from that appropriate for a Rule 50 motion with clarity in its holding in *Aetna Casualty and Surety Co. v. Yeatts*, 122 F.2d 350 (1941), a holding this Court cited with approval in *Gasperini*, 518 U.S. at ___, 116 S.Ct at 2222, 135 L.Ed.2d at 677. The Aetna Court noted:

It is well-established that appellate courts reviewing damage awards owe deference to the trial judge and jury, which had the opportunity to observe the witnesses. However, implicit in the *Gasperini* holding, and in the holdings of the cases which were its precursors, is the recognition that trial judges and juries can err and that excessive awards can and should be set aside:

> We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.

> The distinction between the rules to be followed in granting a new trial and directing a verdict were stated by us with some care in *Garrison v. United States*, 4 Cir., 62 F.2d 41, 42 from which we quoted with approval in the later case of *Roedegir v. Phillips*, 4 Cir., 85 F.2d 995, 996, as follows: "Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side; for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice.

122 F.2d at 353-354. The trial court apparently confused the two analyses, and Officer Hetzel consistently confuses the two inquiries in her Petition. She claims that, because there was some evidence in the record to support the jury verdict, the trial court was correct in confirming the damage award. That is not the appropriate inquiry under Rule 59, as the Fourth Circuit implicitly recognized in finding the award a miscarriage of justice.

Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (2d Cir. 1961), cited in *Gasperini*, 518 U.S. at ___, 116 S.Ct. at 2244, 135 L.Ed.2d at 659. It has also long been recognized that a lower court which commits an error of law (such as making an obvious error as to where the "upper limit" on permissible damages in a case is), abuses its discretion. ("Indeed, it is a familiar, if somewhat circular, maxim that deems an error of law an abuse of discretion." *Gasperini*, 518 U.S. at ____, 116 S.Ct. at 2225, 135 L.Ed.2d at 687 Stevens, J., dissenting on other grounds).

The *Johnson* and *Barber* cases establish where the upper limit of jury verdicts is in civil rights cases of this sort. In applying them, the Fourth Circuit found that the outside frontier of the upper limit was exceeded when it found this verdict "outrageous" and a "gross miscarriage of justice." App. at 7a.

In this case, the trial court noted with particularity its reasons for finding the award appropriate. When the Fourth Circuit examined those reasons, it was justified in finding them unsatisfactory.[19] It is apparent from a reading of the trial court's opinion that, as the Fourth Circuit noted, [20] the

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[19] Officer Hetzel complains that the Fourth Circuit simply substituted its judgment for that of the trial judge. Of course, that is what happens when an appellate court finds that a trial judge has abused its discretion.

[20] Officer Hetzel continues to complain that her evidence of damage was unrebutted. However, there was no significant evidence to rebut. As the Fourth Circuit noted, the evidence "concerning Hetzel's emotional distress consisted almost exclusively of Hetzel's own, brief conclusory statements -- comprising less than ten pages of a joint appendix exceeding 5,000 pages..." App. at 5a. Further, while there were strong indications in the record that much of her distress came from her misperception that she was the victim of discrimination, she did not

district court engaged in "little analysis" of the verdict. App. at 5a. Further, the trial court's opinion is fraught with legal errors and inconsistencies which justified the Court of Appeals in rejecting much of the reasoning set forth in that opinion.[21]

The trial judge stated that the most important factor sustaining the size of the award in this case was that Hetzel was "crying and shaking throughout the trial." Officer Hetzel has not cited one case for the proposition that a litigant's display at counsel table is evidence, and the trial court erred as a matter of law in finding that it was.

The trial court made much of the testimony of First Sergeant John Collier to find corroboration for Officer Hetzel's claims of emotional distress. However, the trial court obviously ignored his testimony that Officer Hetzel told him she attributed much of her emotional stress to the sense that she was discriminated against. App. at 6a. She cannot recover for stress that was not caused by retaliation. Further, in refusing to promote her, the trial court noted that Officer Hetzel has a tendency to overreact to situations. Yet the trial court failed to take this tendency into account in assessing the damage award against the Defendants. It is incorrect as a matter of law to award compensatory damages for harm the Defendants did not cause.

The Fourth Circuit's review of this case was appropriate and necessary to ensure adherence to the purpose of civil rights litigation -- to compensate for harms suffered.[22]

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specifically tie any of the claimed emotional effects to a feeling of being retaliated against.

[21] See footnote 13, *infra*.

"An award of substantial compensatory damages ... must be proportional to the actual injury incurred.... The award must focus on the real injury sustained...." App. at 8a, quoting *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1082 (4th Cir. 1987), *cert. denied*, 487 U.S. 1205, 108 S.Ct. 2847, 101 L.Ed. 2d 885 (1988).

Contrary to Officer Hetzel's dire predictions, the Fourth Circuit's opinion does not mean that successful plaintiffs in civil rights actions will be able to recover no more than nominal damages. It is simply another decision in a long line holding that plaintiffs can recover no more in compensatory damages than they prove to be entitled to at trial. The decision stands for the proposition that awards in these cases must be appropriate in light of the evidence; that they are not limited only by a jury's imagination, even if trial courts neglect their oversight duty. That proposition is a salutary one.

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[22] Officer Hetzel claims that, in reversing the damage award for lack of sufficient supporting evidence, the Fourth Circuit ignored this Court's holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed. 2d 295, (1993). In *Harris*, this Court held that a harassment plaintiff who can show the defendant's conduct was objectively offensive need not demonstrate that she herself suffered psychological injury in order to state a cause of action. It is a bald mischaracterization of the *Harris* holding to state that it says civil rights plaintiffs need not prove *any* injury in order to recover unlimited compensatory damages.

II. THE FOURTH CIRCUIT CORRECTLY ORDERED THE TRIAL COURT TO MAKE A REDUCED AWARD OF ATTORNEYS' FEES TO PETITIONER, WHO ATTAINED ONLY A SMALL FRACTION OF HER OBJECTIVES IN THIS LITIGATION.

Officer Hetzel claimed $176,293 in attorneys' fees at the end of the trial. She obtained supportable verdicts on only two out of ten counts, against two out of four Defendants.[23] Even if the $500,000 damage award were permitted to stand, it was only 1/17th of the relief she sought. She failed on all of her prominent claims, for promotion, back and front pay, and other injunctive relief. She championed no cause but her own.

The trial court's decision to grant her the full amount of attorneys' fees, without comparing the damages she obtained to the relief she sought, is found in two paragraphs at pages 24a and 25a of the Appendix to the Petition. The Court of Appeals set the trial court's decision on attorneys' fees aside when it found this trial court decision "clearly wrong" and because Officer Hetzel would not ultimately obtain any significant damage award in this case at all. App. at 9a-10a. Officer Hetzel argues that, even if the damage award is reduced as ordered by the Court of Appeals, she is still entitled, as a matter of law, to the full award, without regard to what she sought in this suit and what she ultimately obtained. She is incorrect.

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[23] It would, perhaps, be more fair to characterize the County and the Chief as one defendant, since the Chief was sued in his official capacity, and the jury was told that, for the purposes of this litigation, the County and Chief were one and the same.

In its most recent opinion on this issue, this Court held "[w]here recovery of private damages is the purpose ... of civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." *Farrar v. Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 575, 113 L.Ed. 2d 494, 505 (1992) (quoting *Riverside v. Rivera*, 477 U.S. 561, 585, 106 S.Ct. 2686, 2700, 91 L.Ed. 2d 466, 486 (1986) (Powell, J., concurring in the judgment)).[24]

The Court of Appeals noted that "whereas Hetzel's complaint requested $9.3 million in damages, back pay, retroactive promotion to sergeant, and other injunctive relief, she will ultimately receive only a pittance of her original damages request and no injunctive relief, promotion nor back pay." App. at 9a-10a. Importantly, the Court of Appeals went on to quote this Court:

> We emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. *A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.*

App. at 10a, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 439-40, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40, 54 (1983) (emphasis in Court of Appeals opinion).

The Court of Appeals has merely remanded the attorneys' fees award to the trial court for reconsideration in light of the ultimate damage award and the correct legal

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[24] Despite the fact that the Court of Appeals based its decision on attorneys' fees on the *Farrar* decision, Officer Hetzel does not address this case at all in her Petition, much less indicate why the Court of Appeals' reliance on it is misplaced.

principles. It has established no ceiling on attorneys' fees. It is, therefore, premature for Officer Hetzel to complain that the Court of Appeals has established any "rule of proportionality," or that the ultimate award will be unfair. Officer Hetzel's argument that the trial court need not consider the scope of her success in relation to her initial claims has no merit, and her claim that the trial court will apply the Court of Appeals' direction in an unlawful manner is unripe.

III. THE FOURTH CIRCUIT CORRECTLY REFUSED TO DEEM CERTAIN ALLEGED WRONGFUL ACTS AS "ADVERSE EMPLOYMENT ACTIONS" FOR WHICH PETITIONER COULD RECOVER COMPENSATORY DAMAGES,

Because Officer Hetzel argued to the Court of Appeals that the damage award in this case was "easily justified by the numerous adverse actions taken by [Defendants]" (App. at 4a), the Court addressed that allegation by examining the alleged actions. It found that "only the alleged failure to promote and the 1995 I.A. investigation can even possibly constitute adverse retaliatory action, as the other acts either were taken outside the statute of limitations or did not deprive Hetzel of a valuable government benefit." App. at 4a. She wants this Court to find that the "other actions" found by the trial court (App. at 18a) are legally adverse actions for the purpose of retaliation analysis.[25] The writ ought to be denied because this argument has no merit and is moot at this point.

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[25] Although the Court of Appeals lists "poor performance evaluations" among those actions it declined to find as adverse, the trial court did not find that Officer Hetzel's performance evaluations had been negative, and did not list evaluations along with the "other adverse actions."

Further, there were no alleged "other acts" within the statute of limitations that the jury did not address and reject as actionable. Effectively, the Court of Appeals did not rule that any of the alleged acts "failed to deprive Hetzel of a valuable government benefit."

In the first place, the Court of Appeals did not vacate the finding of retaliation; it reversed and remanded the award of compensatory damages. It is a point so familiar and well-established as to require no citation that compensatory damages are calculated to address the effects a plaintiff has suffered as a result of wrongdoing. Courts must focus on the condition of the plaintiff, not the behavior of the defendant, which is a more appropriate inquiry in the context of punitive damages. As a matter of law, then, the number or type of "adverse actions" makes no difference to the assessment of the appropriate level of damages to award on two counts of retaliation. The Court of Appeals' view of adverse actions in the context of damages is, therefore, moot.

Further, the "other actions" were all, with one exception, outside the statutes of limitation that applied in this case.[26] The one exception is the trial court's finding of unspecified "abusive treatment," which the jury had already addressed and rejected when it found that none of the Defendants had harassed Officer Hetzel by creating a hostile and offensive working environment within the statutes of limitation.

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[26] Those dates were July 13, 1992, for the First Amendment claim, and January 29, 1993 for the Title VII claim. The district court cited denial of transfers as adverse. The evidence clearly established, with no rebuttal from Officer Hetzel, that only two transfers were ever denied to her -- in September of 1990 and February of 1992. Disparate disciplinary treatment was also cited. Officer Hetzel received her last disciplinary action, before the trial of this case, in August of 1991.

IV. THE COURT OF APPEALS' FINDING THAT PETITIONER'S CROSS-APPEAL WAS MOOT OR THAT IT WAS WITHOUT MERIT, EVEN THOUGH MADE SUMMARILY, DOES NOT AMOUNT TO A "REFUSAL" TO CONSIDER HER APPEAL.

Officer Hetzel claims in her Petition that the Fourth Circuit Court of Appeals, by its wording in footnote 2 to its opinion (App. at 8a) "refused" to consider her cross-appeal. However, her assertion that the Court of Appeals "simply declined to address this issue, at all," flies in the face of the specific language of Footnote 5:

> Both parties raise numerous other issues. We have *carefully considered each issue* and have concluded that the remaining claims either have not been properly preserved for appeal or are without merit."

App. at 11a (emphasis supplied).

The Court of Appeals was correct in determining this issue to be without merit, even if it simply announced its determination in a footnote. As a matter of law, Officer Hetzel's claim that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits pure retaliation, in the absence of any finding of discrimination, is without merit.[27]

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[27] Officer Hetzel continues to allege in her Petition, as she did to the trial court, that because the Defendants did not specifically state, as part of their two Rule 50 motions during the trial, that the Equal Protection Clause does not prohibit retaliation devoid of discrimination, the trial court had no jurisdiction to set the verdict on that count aside. The trial court correctly found that it had jurisdiction. Even assuming that

It is axiomatic that discrimination against a person because of membership in a protected class violates the Equal Protection Clause, and retaliation against a person for filing a charge of such discrimination violates Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e)(3)). However, it has not been established that the Equal Protection Clause provides a cause of action for retaliation in the absence of any finding of discrimination. By its terms, the Equal Protection Clause protects membership in particular classes, not conduct.[28]

In *Gray v. Lacke*, 885 F.2d 399 (8th Cir. 1988), *cert. denied*, 494 U.S. 1029, 110 S.Ct. 1476, 108 L.Ed. 2d 613 (1990), the Court of Appeals for the Eighth Circuit addressed the issue Officer Hetzel presents here and rejected the Equal Protection retaliation claim. The Court explained:

> Gray's complaint makes numerous allegations to the effect that the appellees harassed and retaliated against her because she openly complained about and filed grievances over sexual harassment and sex

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the Defendants had failed to raise the issue in the Rule 50 motions, the question of whether the Equal Protection Clause creates a cause of action where no discrimination is found is a legal one. Since no evidence Officer Hetzel could produce would change the terms of the Fourteenth Amendment, the basic purpose behind Rule 50(b)'s prohibition on addressing motions for judgment n.o.v. did not exist here. The trial court could, therefore, refuse to confirm a verdict on a cause of action that did not exist as a matter of law. *FSLIC v. Reeves*, 816 F.2d 130 (4th Cir. 1987).

[28] The First Amendment protects conduct to the extent that it can be characterized as speech. Thus, the First Amendment might support a cause of action for retaliation for false claims of discrimination. In fact, Officer Hetzel obtained a verdict of retaliation in violation of the First Amendment.

> discrimination within the Dade County Sheriff's Department. The allegations, however, do not show that Gray has been discriminated against because she is a member of a particular class. The appellees allegedly retaliated against her because of her conduct, not because she is a woman.
>
> *Gray's right to be free from retaliation for protesting sexual harassment and sex discrimination is a right created by Title VII, not the equal protection clause. See 42 U.S.C. §2000e-2. Section 1983 provides a remedy for deprivation of constitutional rights. It supplies no remedy for violation of rights created by Title VII.*

Gray, at 414 (emphasis supplied).[29]

Officer Hetzel cites no authority in her Petition, and she cited no authority below for the proposition that the Equal Protection Clause creates a cause of action for pure retaliation.[30] Causes of action do not exist by negative

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[29] The Fourth Circuit has adopted the reasoning of the Eighth Circuit on this point, holding that a 42 U.S.C. §1983 plaintiff must demonstrate a violation of the First Amendment to make out a claim for pure retaliation; necessarily implying that the Fourteenth Amendment is not the source of such a cause of action. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994).

[30] She cites *Davis v. State University of New York*, 802 F.2d 638 (2d Cir. 1986); *Kellner v. General Refractories Co.*, 631 F.Supp. 939 (N.D. Ind. 1986); and *Downey v. Isaac*, 622 F. Supp. 1125 (D.D.C.), *aff'd without opinion*, 794 F.2d 753 (D.C.Cir. 1986), and says that the law is well-settled in this area. These cases deal with claims of retaliation, arising under Title VII, rather than under the Equal Protection Clause. In no way, shape, or form do these cases settle, or even address the application of the Equal Protection Clause to protect conduct. In fact, the *Davis* court dismissed all claims under the Equal Protection Clause at

implication; particularly where suit is brought under §1983, which creates no substantive rights on its own. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405, *reh. denied* 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed. 2d 811 (1976). See also *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1205 (6th Cir. 1984) (retaliation is not a proper basis for a §1983 claim).

Because the trial court and the Fourth Circuit correctly rejected Officer Hetzel's cause of action for pure retaliation under the Fourteenth Amendment, the Petition should be denied on this issue.

CONCLUSION

In summary, the Petition presents no important question which has not already been addressed by this Court. The decision of the Fourth Circuit appropriately applied prior decisions of this Court, and is not in conflict with decisions in other circuits. For the foregoing reasons, the writ of certiorari should be denied. Further, the Seventh Amendment issue raised by the Petition should have been addressed to the Fourth Circuit, and the question of whether attorneys' fees will ultimately be appropriate in light of Officer Hetzel's success in this matter is not now ripe for decision. Finally, the Fourth Circuit reversed and remanded a trial court decision confirming an outrageous verdict, which was a clear error as a matter of law and an abuse of discretion. For these reasons, the Petition for Writ of Certiorari should be denied.

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trial; the case proceeded to the appellate court on Title VII allegations alone. The plaintiffs in *Kellner* and *Downey* made their allegations under Title VII alone.

Respectfully submitted,

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